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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 22nd April 1953

S. R. O. 785.—WHEREAS the election of Shri Tarakdas Banerjee and Shri Kalinarayan Sinha as members of the West Bengal Legislative Council, from the Nadia-Murshidabad Local Authorities constituency of that Council, has been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Biswanath Roy of Berhampore, West Bengal;

AND WHEREAS, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

Now, THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, WEST BENGAL

ELECTION PETITION No. 329 OF 1952.

ELECTION CASE No. 9 OF 1952 OF WEST BENGAL

CORAM

Sri S. C. Ray Chaudhury, M.A., LL.B.—Chairman.

Sri M. N. Gan, M.A., LL.B.

Sri Sudhir Kumar Bhose, M.Sc., LL.B.—Members of the Tribunal.

In the matter of an Election Petition under Section 81 of the Representation of the People Act, 1951.

AND

In the matter of Biswanath Roy of Berhampore, Police-station Berhampore Town, District Murshidabad—Petitioner.

Versus

- (1) Sri Tarakdas Banerjee of Krishnagar, Nadia.
- (2) Sri Nagendra Kumar Bhattacharjee of Berhampore, Murshidabad.
- (3) Sri Naran Goswami of Santipur, Nadia.
- (4) Sri Subodh Mitra of Birnagar, Nadia.
- (5) Sri Kalinarayan Sinha of Jiaganj, Murshidabad.
- (6) Sri Chhatrapati Roy of Berhampore, Murshidabad.—Respondents.

FOR PETITIONER—

- (1) Sri J. C. Moitra,
- (2) Sri S. Gupta—*Counsel.*
- (3) Sri R. P. Bagchi,
- (4) Sri A. K. Sen—*Advocates.*

FOR RESPONDENT No. 1—

Sri Sankar Das Banerjee, Standing Counsel with

- (1) Sri Umapada Bhattacharjee,
- (2) Sri Jagat Bandhu Laha—*Pleaders.*

FOR RESPONDENT No. 5—

Sri Aswini Kumar Ghosh—*Advocate.*
with Sri Nut Behari Dutt—*Pleader.*

The 16th April, 1953

JUDGMENT

The election to the West Bengal Legislative Council from Nadia-Murshidabad (Local Authority) Constituency has been called in question presenting an Election Petition under section 81 of the Representation of the People Act, 1951. It is a double-seated constituency. The Petitioner, Biswanath Roy and the Respondent Nos. 1 to 5 contested the election. The Respondent No. 6, Chatrapati Roy was another duly nominated candidate who withdrew his candidature within the notified time. The election was held by postal ballot between the 7th of May and the 29th of May, 1952. The counting of votes took place on 30th May, the election being conducted on the system of single-transferable vote. The Respondent No. 1, Tarakdas Banerjee and the Respondent No. 5, Kalinarayan Sinha who fought on the tickets of Indian National Congress were declared as duly elected.

The petitioner, Biswanath Roy alleges that he obtained such number of valid 1st preference votes as would have been sufficient to ensure his success in the election in preference to Respondent No. 5, Kalinarayan Sinha, as larger numbers of valid votes were cast in his favour than what were cast in favour of the said Respondents No. 5.

The election has been challenged on the following amongst other grounds :—

- (a) There has not been a free election by reason of corrupt and/or illegal practices.
- (b) The result of the election has been materially affected by improper reception of void votes cast in favour of Respondents Nos. 1 and 5.
- (c) The result of the election has been materially affected on account of non-compliance with the provisions of the Constitution and of the Representation of the People Act, 1952 and the rules and orders made thereunder.

Serious allegations have been made that the ballot papers were tampered sometime during the period after they were posted and before the votes were counted with the assistance of persons serving under the Government changing the figures of the preference votes for the furtherance of the prospects of election of the Respondents Nos. 1 and 5. Further allegations have been made that secrecy of voting was infringed as the result of the election was declared by the agents of the Respondent No. 5 prior to the date of counting. A fresh count has been demanded taking into account the alterations made in the figures of preference votes against the names of the petitioner and the Respondent No. 5. Prayer has been made for declaration that the Petitioner having obtained a majority of valid votes as between himself and the Respondent No. 5, be declared as duly elected. Separate prayers have been made for declaring the election of Respondent No. 1 and Respondent No. 5 void and for disqualifying them for a period of 6 years.

A list of full particulars of corrupt and illegal practices as required under section 83(2) of the Representation of the People Act, 1951 has been attached to the Election Petition, but at the commencement of the trial except the pleas of tempering of ballot papers and of violating the secrecy of votes, all other statements made therein regarding offering of money to some electors, providing vehicles for the conveyance of the electors, marking of the voters in the ballot papers by the Respondents Nos. 1 and 5 taking the said ballot papers from the electors and undue influence of coercion and intimidation interfering with free exercise of right of franchise of the electors, have not been pressed.

The Respondents Nos. 1 and 5 contest the case. Copies of Election Petition were served on the other respondents as required under section 90(1) of the Representation of the People Act, 1951, but they have not entered appearance. The Respondents Nos. 1 and 5 filed separate written statements traversing all the material allegations made in the Election Petition regarding

corrupt and illegal practices, improper reception of void votes, non-compliance with the provisions of the Constitution and of the Representation of the People Act, 1951 and the rules and orders made thereunder, tampering of ballot papers and infringement of the secrecy of votes. Their contention is, that there has been a free election and the result of the election has not been materially effected, as alleged. All the allegations made in the list of full particulars of corrupt and illegal practices, have been emphatically denied.

The following issues, as amended, during the commencement of the trial arise for decision :—

ISSUES

1. Has there not been a free election by reason of corrupt practices of bribery, coercion and intimidation of electors by the agents of Respondents Nos. 1 and 5 ?
[Expunged by Order dated 20th March, 1953.]
2. Has the result of the election been materially affected on account of tampering of ballot papers (by the Respondents Nos. 1 and 5 or by the Respondent No. 5 with the connivance of Respondent No. 1 as alleged):
[Bracketted portion expunged by Order dated 20th March, 1953.]
3. Has the result of the election been materially affected by non-compliance with the provisions of the Representation of the People Act, 1951 and of the rules made thereunder for maintenance of secrecy of votes and for the counting of votes on the basis of proportional representation by single transferable vote?
4. Is the petitioner entitled to be declared as duly elected for receiving in fact majority of valid votes as between himself and Respondent No. 5 ?
5. Is the petitioner entitled to be declared as duly elected, as, but for the votes obtained by the returned candidates, Respondents Nos. 1 and 5, by corrupt or illegal practices, the petitioner would have obtained a majority of valid votes ?
6. Can the election of the Respondent No. 5 or Respondent No. 1 be declared void ?
7. What relief, if any, is the petitioner entitled to ?

DECISION.

Issue No. 1.—This issue has been expunged as the case of corrupt practices of bribery, coercion and intimidation has been given up.

Issue No. 2.—This issue has been amended retaining it in a general form that the result of election has been materially affected on account of tampering of ballot papers. The allegations that the tamperings were effected by/or with the connivance of Respondent Nos. 1 and 5 are not pressed.

Prayer was made on the petitioner's side for inspection of the ballot papers at the commencement of the trial. It was refused at that stage as the Election Petition did not disclose details to make out a *prima facie* case in support of such prayer. The petitioner thereupon after examining himself, called the evidence of some of the voters who, he alleged, voted for him at the election, to show that in fact some of the voters did record their votes in his immediate presence. Three of his workers were also examined to give evidence that in their presence certain other electors recorded votes for him. It has been contended that the scrutiny of the relevant ballot papers with reference to the evidence adduced would show a different result. The learned lawyer for the Respondent No. 5, Sri Nut Behari Dutt objected to the evidence of the voters and contended that it was inadmissible in view of the bar of Section 94 of the Representation of the People Act, 1951. This objection lost its practical importance in the trial inasmuch as the witnesses were not asked to state for whom they voted. Accordingly, the objections as to the questions put to the witnesses were disallowed. Out of the voters examined, except one, the rest stated of their own accord that they voted in a particular way for the petitioner. To this another objection towards the close of recording the evidence on the petitioner's side was taken on behalf of the contesting respondents that such evidence of the witnesses being voluntary on the point at issue should be expunged from record. The question was argued at great length by the learned lawyers for the petitioner and the respondents and the Tribunal proposed to deal with it in the judgment.

Sri Nut Behari Dutt on behalf of the respondents relied on sections 94, 95 and 128 of the Representation of the People Act, 1951 and referred to certain observations in Woodruffe's Evidence, 9th Edition, p. 977 and also to Jagat Narain's Law of Election and Election Petitions in India and Burma, p. 332. He further invited the attention of the Tribunal to Schofield's Parliamentary Election, p. 537 in support of his contention that the secrecy of the ballot is to be maintained for ever and that the evidence which has been volunteered by the witnesses violating the secrecy is to be expunged. In short, he contends that the witnesses should not, in any event, be permitted to state for whom they voted at the election.

In reply Srl J. C. Moitra, the learned counsel for the petitioner, while conceding that section 94 of the Representation of the People Act, 1951 prohibits any question requiring a voter to state for whom he has voted at an election, contends that the section gives a personal privilege to the voter which he can forego and the statements of the voter-witnesses disclosing of their own accord for whom they voted are not voluntary in the sense in which it is used in Woodroffe's book

Section 95 of the Representation of the People Act, 1951, corresponds to section 132 of the Indian Evidence Act, with necessary modifications to grant a certificate of indemnity. The general provision in section 95 is controlled by section 94 which enjoins that secrecy of voting should not be infringed. The language of the said section which is similar to that of section 21 of the English R. P. Act, 1949 only prohibits enquiry from a person for whom he has voted at an election. The object of this provision of law is evidently to give protection to the voters. We may profitably quote a very valuable observation from American Jurisprudence, Vol. 18, Section 308, p. 379-80 which runs thus—

"The privilege of a legal voter to refuse to testify for whom he cast his ballot is personal and can be raised and waived by him only. If a witness voluntarily admits the illegality of his vote, he thereby waives the privilege of refusing to testify on the ground of self-incrimination and may be required to disclose how he voted. It seems that laws providing for secrecy of the ballot did not preclude enquiry into the question for whom votes were cast, since the voter, if he so desires, may waive the privilege of secrecy". This observation amply supports the contention of the learned counsel for the petitioner that section 94 is not absolute, but a voter has the right to waive the personal privilege given to him, if he so desires. The observation in Woodroffe's Evidence, 9th Edition, p. 977 to which reference has been made by the learned lawyer for the respondents is, to the effect, "a witness may not foist into his answer in any examination statements not in answer to questions put to him. This is called 'volunteering evidence', and the pleader of the opposite party should be on his guard to check its introduction by objection. The trial Judge should upon motion strike out answers that are not responsive to the questions asked, that is, those answers that stated facts not called for by the questions, or those which express an opinion as to the matter in question, unless the question calls for an opinion, as in the case of experts. But where only a part of the answer is not responsive to the question, only that part will be stricken out which is objectionable for not being responsive." Here the question put to the witnesses was whether they did exercise their right of franchise. No enquiry was made for whom the witnesses voted, violating the provision in section 94 of the Act. The answer given by the witnesses mentioning the fact in whose favour they did cast their votes cannot be said to be not responsive to the question. The privilege of maintaining secrecy which the voter-witnesses had, was waived. It has been rightly contended by Mr. Moitra that the answers given disclosing the names of the candidates were neither irrelevant nor inadmissible according to the provisions of the law. He has argued that the general principle is that in examination-in-chief the witness should, as far as possible, be allowed to tell his story in his own way. Reference has in this connection been made to Phipson on Evidence, 9th Edition, p. 58 where it has been observed that "it is not necessary that the relevancy of a fact should appear at the time it is proved; the Judge will always admit evidence on the undertaking of counsel to show its bearing or admissibility at a later stage, failing which it would be struck out." It has been contended that the admissibility of the evidence has been sufficiently established and, as such it should not be struck out. In Jagat Narain's law of Election and Election Petitions in India and Burma, pp 332-33 to which reference has been made on the respondents' side, it has been laid down that "it would appear that the provisions of section 14 enjoin the maintaining of secrecy of voting. No time-limit is fixed and such secrecy is to be maintained for ever. The section would cover the case of a voter who has voted and also a person who has not voted. The information as to who has voted as also for whom he has voted, and as to who has not voted, is to be kept secret." Section 14 referred to above corresponds to section 128 of the R.P. Act 1951 to which the learned lawyer for the respondents has also placed reliance. Section 128 provides for maintenance of secrecy of voting by every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election. It does not fetter the right of the voter to divulge his secret, if he so desires. The maintenance of secrecy by the persons mentioned in the section is in the interest of the voters who are given protection under section 94 of the Act. The observation in Schofield's Parliamentary Election p. 557 to which reference has been made deals with the question of personation. It has been observed that "evidence may be called, but witnesses must not be asked for whom they voted, for no person who has voted at the election shall in any legal proceeding to question the election or return be required to state for whom he voted. There would appear to be no objection to the witness volunteering this information, particularly in a case of personation." If such volunteering be permissible to prove a case of personation, it may equally be not objectionable to prove a case of forgery by tampering. This authority does not accordingly much support the contention of the respondents. Considering all these provisions of law we hold that the statements made by the voters examined in this case, waiving the privilege of maintaining the secrecy of votes, need not be expunged.

Scrutiny of ballot papers was held after the close of the evidence, granting Petitioner's prayer in the presence of the Petitioner himself, his lawyers and the lawyers of the contesting respondents. The object was to determine if there had been any tampering of ballot paper rendering the vote void and whether any such void vote was taken into account. The details of what have been

noticed on scrutiny are recorded in a confidential note. A separate report of the result of the scrutiny has been prepared for use as evidence, which has been accepted by all the parties concerned. After the scrutiny the learned Counsel Sri J. C. Mitra and the Petitioner Sri Biswanath Roy himself had to abandon the objection of tampering of the ballot papers, there being no sign of any tampering in any of the ballot papers including those referred to in the evidence of the Petitioner, his workers and his voter-witnesses. Allegations relating to tampering were made in para 9 of the Election Petition and para 1 of the list of Full Particulars given under Section 83(2) of the R.P. Act, 1951. The statements were verified by the Petitioner as true to his information. According to his evidence such informations are based on inference drawn by him relying on the verbal reports of his workers, P.W. 16 Penaki Ranjan Roy, P.W. 20 Aswini Kumar Roy and P.W. 23 Nirmal Kumar Roy. The Petitioner without taking any steps for verification made reckless statements that the respondents Nos. 1 & 5 managed to tamper the ballot papers sometime during the period after they were posted and before the votes were counted, with the assistance of persons serving under the Government. He went so far as to assert that the tampering was affected by changing the figure "1" recorded as first preference vote in his favour mainly into "4" and putting the figure "1" against the name of the Respondent No. 5 and sometimes against the name of Respondent No. 1 also. Section 83(2) of the R.P. Act, 1951, enjoins that, as full a statement as possible as to the names of the parties alleged to have committed corrupt or illegal practices and the date and place of commission of each such practice should be set forth in a verified statement. The Law does not contemplate that vague allegations of such a serious nature may be made in an Election Petition to start an investigation.

The Petitioner in his evidence gives the names of 19 voters who are alleged to have recorded in his immediate presence their first preference votes in his favour. The scrutiny of the ballot papers corroborates his evidence in respect of 17 of those voters. Of the other two one did not at all vote for him and another did not give him the first preference vote. Admittedly there has been no tampering in these ballot papers. The Petitioner expected two other first preference votes as stated in his evidence, but as a matter of fact, those voters gave him the second preference votes. Those ballot papers also show no sign of tampering as admitted by the Petitioner and his lawyers.

The Petitioner was to some extent misled by the statements of some of his workers. His witness P. W. 23 Nirmal Roy mentioned the names of 4 voters as giving first preference votes to the Petitioner. The scrutiny of the ballot papers supported his evidence to the extent of 3 of them and another did not at all vote for the Petitioner. Another worker P. W. 20 Aswini Kumar Roy mentioned the names of 3 voters of whom 2 did not at all vote for the Petitioner and another did not cast the first preference vote in his favour. The worker P. W. 16 Penaki Ranjan Roy also gave 4 names of voters of whom only 2 voted for the Petitioner but not in the manner stated. None of those ballot papers show any sign of tampering admittedly. After the scrutiny of all the ballot papers, the Petitioner was not in a position to challenge any of the ballot papers on the ground of tampering. The result of counting was that the Petitioner got 20 first preference votes. The scrutiny does not at all disclose a different result.

On a careful examination of the evidence and comparing with the result of the scrutiny the Tribunal finds that there had been no tampering of any ballot paper.

It is extremely unfortunate that the Petitioner, who is an experienced lawyer and a Managing Director of a Banking Corporation, having record of public service to his credit, should act as he has done in this case, without due care and caution and present this Election Petition making very serious allegations not only against the successful candidates who are respectable gentleman, but also against the Government servants, on mere suspicion. He could not poll as many votes as he expected. His expectations were not fulfilled and his failure completely unsettled him. In sheer frustration he suspected the entire machinery of the election. It has now been proved to demonstration that all his suspicion about the successful candidates and the Government employees are baseless, unreasonable and unjustified. His action deserves disapproval in strongest terms. It seems that wiser counsel prevailed at the time of trial and all the objectionable features of the case were abandoned in the very beginning. The Tribunal decides this issue against the Petitioner.

Issue No. 3.—There is nothing to show that there has been any non-compliance with the provisions of the R. P. Act, 1951 and of the Rules made thereunder. It has been alleged, that P. W. 1, Sreepada Bhattacharya announced before the counting of votes the result of the election and as such there had been infringement of the secrecy of votes in contravention of the provisions of law. Sreepada Bhattacharya totally denies the allegations that he made any statement regarding the votes secured by the two returned candidates and the Petitioner. On this point the Petitioner has examined his worker P. W. 23 Nirmal Roy and two other respectable witnesses, P. W. 5 Sarat Chandra Basu and P. W. 6 Lalit Mohan Mazumder. When the Petitioner came out of the counting room finding that he got only 20 first preference votes, Nirmal Roy told him that Madan Alias Sreepada Bhattacharya informed him before hand about the votes that would be secured by the Respondents Nos. 1 and 5, and the Petitioner, and he was very much surprised when the actual result of counting agreed with the previous statement of Sreepada Bhattacharya. Sreepada Bhattacharya does not at all admit that he made any such statement before

Nirmal Roy and he goes so far as to say that he never knew Nirmal Roy and never worked in connection with the election. Sarat Chandra Basu and Lalit Mohon Mazumdar only come to say that a day or two after the counting of votes when they were sitting on the lawn of Jogindra Illani Club, the Petitioner asked Sreepada Bhattacharya, in their presence whether he told Nirmal Roy about the result of the poll before it was announced. The said Sreepada Bhattacharya admitted that he did so. Thereafter when the Petitioner further questioned how he could know the result of the election beforehand, Sreepada Bhattacharya left the place without giving any reply. On consideration of the evidence on this point, it appears that Sreepada Bhattacharya suppressed the truth when he categorically denied the Petitioner's story. There is no reason to disbelieve the old respectable gentlemen who corroborate the said story. Sreepada Bhattacharya's statement about the result of the poll might as much be a guess work as that of the Petitioner and his workers. That might be a speculative forecast about the result of the poll which in the end came to be true. In our opinion, this neither affects the secrecy of the votes nor proves my access to the ballot papers. There is no merit in this Issue which accordingly fails.

Issue Nos. 4 and 5.—The Petitioner has not, in fact, secured the majority of the valid votes or the respondents Nos. 1 and 5 obtained votes by reason of any corrupt or illegal practice; there is absolutely no ground for a declaration that the Petitioner has been duly elected. These issues are no longer pressed after the scrutiny of the ballot papers.

Issue No. 6.—There is absolutely no ground for declaring the election of the Respondents, Nos. 1 and 5 void. The election was held according to law and the Respondents Nos. 1 and 5 were declared duly elected after the counting of the votes according to the system of proportional representation by single transferable votes. This Issue is answered in the negative.

Issue No. 7.—The Election Petition must accordingly be dismissed. As to costs we do not find any reasonable ground for departing from the ordinary rule that costs should follow the event. The case was ill-conceived and was instituted without due care and caution. The only redeeming feature was that the trial was confined to points to which no reasonable objection could be taken and that it was not unduly prolonged. Considering all these the Tribunal directs that the Petitioner should pay to the contesting respondents 1 and 5 costs as specified below.

ORDER

The Election Petition No. 329 of 1952 calling into question the election to West Bengal Legislative Council from Nadia-Murshidabad (Local Authorities) Constituency be dismissed with costs. The Petitioner do pay Rs. 100 for costs to each of the contesting Respondents Nos. 1 and 5.

(Sd.) S. C. RAY CHAUDHURI, *Chairman,*
Election Tribunal.

(Sd.) M. N. GAN, *Member,*
Election Tribunal.

(Sd.) SUDHIR KUMAR BHOSE, *Member,*
Election Tribunal.

[No. 19/329/52-Elec. III/5424.]

By Order,

P. R. KRISHNAMURTHY, *Asstt. Secy.*